STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 7, 2000
v	No. 206775 Calhoun Circuit Court
SHARON KAY ZACHARY, Defendant-Appellant.	LC No. 97-000926-FC

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions of first-degree murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction and fifteen to thirty years' imprisonment for the armed robbery conviction. We affirm.

Defendant's convictions stem from the bludgeoning death of an eighty-year old male friend of defendant. At the time of the killing, the victim had taken to spending his nights in defendant's nearby home because of prior robberies and beatings he had suffered in his own home. The victim had a reputation for storing large sums of money in and around his home. The victim had given defendant his power of attorney to help the victim manage his finances, and also had also designated defendant the sole beneficiary of his will. However, approximately two weeks before the murder, apparently suspecting that defendant had misappropriated some of his money, the victim requested that his attorney revoke the power of attorney. The victim's body was found in his home on April 26, 1996. Approximately twenty-five to thirty blows had been inflicted to his head by a metal pipe. The pipe was later found in a pond behind the victim's house.

I

Defendant first argues that the trial court committed error requiring reversal when it allowed the prosecutor to ask two defense character witnesses about specific instances of prior misconduct on defendant's part. Specifically, defendant contends that the trial court abused its discretion because the alleged misconduct did not relate to the character traits testified to by the witnesses, and because the

prosecutor did not provide advance notice of his intent to question the character witnesses about the alleged misconduct. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). "There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id.*

MRE 404 provides in pertinent part:

> (a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a specific occasion, except:
>
> (1) *Character of accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

MRE 405(a) provides:

> (a) *Reputation or Opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

After defendant had questioned two defense witnesses about whether they had an opinion on whether defendant was a caring and nonviolent person, the prosecution asked the court to rule on whether it would be allowed under MRE 405(a) to question future character witnesses on specific instances of misconduct on defendant's part. The court considered the interplay of MRE 404 and 405 and ruled that if defendant opened the door to character evidence, then the prosecution would be allowed to inquire about specific instances of misconduct that related to the character trait or traits testified to on direct examination.

If a defendant decides to offer opinion or reputation testimony regarding a pertinent character trait for the purpose of establishing that he did not commit the crime charged, then the prosecution is permitted to rebut this assertion on cross-examination by asking the witness about specific instances of misconduct. MRE 405(a); McCormick, Evidence, § 191, p 348 (Abridged ed, 1992). However, a defendant's decision to open the door to character evidence does not mean that there are no constraints on the prosecution's right to introduce evidence of the defendant's bad character. For one thing, the prosecution should not ask about instances of misconduct unless the prosecution possesses a good faith factual basis for believing that the alleged misconduct actually occurred. *People v Whitfield*, 425 Mich 116, 132 n 16; 388 NW2d 206 (1986). Further, the prosecution is only allowed to inquire about instances of misconduct that relate to the specific trait or traits put in issue by defendant. *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999); McCormick, *supra* at § 191, p 348.

Accordingly, our inquiry in the case at hand turns on the scope of the particular questions posed by the prosecution.[1] On direct examination, a longtime friend of defendant opined that defendant was a

caring person incapable of committing an act of violence. On cross-examination, the prosecution asked whether the witness's opinion would change if the witness knew that defendant made a threatening telephone call in 1992, and that defendant had misappropriated funds from an automobile dealership. Defendant argues on appeal that the relationship between the telephone threat and the trait of nonviolence is too attenuated for the inquiry to be pertinent to the crimes charged.[2] We disagree.

Contrary to defendant's assertion, the prosecution's inquiry was not rendered improper because the telephone call constituted a threat and not the completion of physical violence. The prosecution was not required to maneuver through a legal maze of categories and subcategories of violent behavior when rebutting defendant's evidence of her nonviolent character. Both the threat of physical violence and the actual performance of physical violence spring from the same trait of character that defendant claimed not to possess. *Michelson v United States*, 335 US 469, 483; 69 S Ct 213; 93 L Ed 168 (1948). Therefore, we hold that the questioning was proper.

The other character testimony implicated in this appeal was given by defendant's sister. On direct examination, defendant's sister opined that defendant was a caring person who was incapable of performing an act of violence. On cross-examination, the prosecution once again asked if knowledge of the threatening telephone call and the misappropriation of funds would affect the sister's opinion. Defendant argues on appeal that because the alleged misappropriation of funds bears no relationship to the trait of caring, the trial court erred in allowing this line of inquiry.[3] We disagree. If an individual can be described as being a caring person, this means that the individual is known for an undiscriminating tendency to exhibit concern and empathy for others. Arguably, the misappropriation of another's money evidences a lack of concern and empathy for the well-being of others.

We also reject defendant's argument that the prosecutor was required to provide notice before trial of his intent to inquire into these specific instances of misconduct. There is no requirement of advance notice in MRE 405(a). Further, under the circumstances of the case at bar, we conclude that defendant's reliance on *Whitfield*, *supra*, is misplaced. The requirement of advance notice set down in *Whitfield* was part of the procedure established for retrial of that particular case.

Finally, we conclude that the danger of unfair prejudice presented by questioning on the alleged instances of misconduct did not substantially outweigh its probative value. MRE 403. Accordingly, we hold that the trial court did not abuse its discretion in allowing the prosecution to follow this course of inquiry.

II

Next, defendant argues that the trial court abused its discretion in denying her motion for a new trial based on newly discovered evidence that the jailhouse informant who testified for the prosecution allegedly perjured herself at trial. We disagree. As this Court observed in *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995):

> Before a new trial is warranted, a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a

> different result, and (4) was not discoverable and producible at trial with reasonable diligence. . . . A trial court's decision regarding a motion for a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. [Citation omitted.]

In this case, the record demonstrates that the witness did not admit to any willfully false statements so as to support a claim of perjury. *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). The motion for a new trial was based entirely on the testimony of the jailhouse chaplain who spoke with the witness after trial. In both his affidavit and testimony at the hearing on defendant's motion, the chaplain indicated that the informant stated that her trial testimony was truthful. The informant's personal feelings about defendant's innocence and the way in which her testimony was used by the prosecution is of no import. Therefore, because defendant fails to establish that the result would have been changed by this newly discovered evidence, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Miller, supra* at 54.

III

Finally, defendant contends that the trial court abused its discretion by denying her discovery request with regard to the jailhouse informant's mental health records, and by denying her request to use those materials or to call the informant's psychologist as a witness at trial. We disagree. The records allegedly contain information regarding the informant's honesty. Following an in-camera review of the records, *People v Stanaway*, 446 Mich 643, 679; 521 NW2d 557 (1994), the trial court concluded that defendant failed to make the required showing that the records should be made available to the defense. We agree with the trial court.

As our Supreme Court has observed, "evidence protected by privilege should be provided to defense counsel only if the court finds that the evidence is essential to the defense." *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998). At trial, defendant was able to impeach the informant's credibility by getting her to admit that she did not have a good reputation for telling the truth and that many people would consider her an habitual liar. She also admitted lying to the police and to telling the prosecutor different stories about what defendant had told her. Further, several witnesses who knew the informant testified that she was not a person whose word could be trusted. Therefore, we conclude that the excluded evidence would merely have been cumulative, and thus not "essential to the defense." *Fink, supra* at 455.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] Defendant does not argue that the prosecution did not have a good faith belief that the misconduct did occur.

[2] With respect to this witness, defendant does not challenge the prosecution's questioning about the alleged misappropriation of funds.

[3] With respect to this witness, defendant does not challenge the prosecution's questioning about the telephone threat.